Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment to the Commission's	)	WT Docket No. 95-157
Rules Regarding a Plan for Sharing	)	
The Costs of Microwave Relocation	)	

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

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TABLE OF CONTENTS

SUMMARY

The Commission's adoption of a cost-sharing plan for microwave relocation will promote the Commission's goals of minimizing the economic burden on and disruption to the microwave incumbents. In addition, the concept of cost-sharing reflects sound principles of equity and fairness. The Commission must be careful, however, to avoid micromanaging the cost-sharing plan or the relocation rules generally. The parties must have the freedom to negotiate between themselves in order to arrive at mutually advantageous terms and the Commission must reject any proposals which would have a chilling effect on those negotiations.

For instance, the measure of reimbursable costs should be the actual costs of the relocation rather than an arbitrary number such as the one proposed by the Commission. A reimbursement cap will reopen the doors to the very problems, such as the "free rider" concern, that the adoption of a cost-sharing plan was intended to remedy. For similar reasons, a subsequent PCS licensee should be required to reimburse an earlier PCS relocator if the subsequent PCS licensee would have interfered with the displaced microwave incumbent on either a co-channel or adjacent channel basis.

In addition, AAR is deeply concerned that the Commission is now revisiting, and apparently rewriting, the rules set forth in the Third Report and Order and Memorandum Opinion and Order in ET Docket 92-9 ("Third R&O"). A number of the proposals in the NPRM, if adopted, would undermine the protections afforded to the nation's railroads and other 2 GHz fixed microwave licensees, all of which were designed to ensure continued safe

operations and fundamental fairness. Specifically, the Commission's proposals concerning the definition of comparable facilities and downgrading incumbent operations to secondary status after ten years threaten the safe and reliable operations of the nation's railroads and frustrate the principle of full compensation for relocation costs which was central to the Third R&O.

Finally, the Commission must ensure that the definition of "good faith negotiations" imposes reciprocal obligations on both parties to the negotiations, and furthermore, that it does not preclude substantive discussions or penalize differences over what constitutes comparable facilities.

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To: The Commission

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads ("AAR"), by its undersigned counsel and pursuant to Section 1.405 of the Rules of the Federal Communications Commission (FCC or Commission), respectfully submits these Comments in response to the Notice of Proposed Rule Making ("NPRM") in the above-referenced proceeding. This proceeding addresses a cost-sharing plan for microwave relocation and aspects of the Commission's relocation guidelines.

I. Preliminary Statement

AAR is a voluntary non-profit organization composed of member railroad companies operating in the United States, Canada and Mexico. These railroad companies generate 97 percent of the total operating revenues of all railroads in the United States. AAR represents its member railroads in connection with federal regulatory matters of common concern to the

industry as a whole, including matters pertaining to the regulation of communications. In addition, AAR functions as the frequency coordinator with respect to the operation of land mobile and other radio-based services.

The U.S. railroad industry deploys and depends on a sophisticated and comprehensive interrelated radio communications network consisting of both mobile and fixed point-to-point communications systems and facilities. The railroads use private fixed microwave systems that operate on frequencies in the 2 GHz band to meet safety and reliability requirements in their day-to-day operations. Private microwave facilities are used to monitor and control more than 1.2 million freight cars on more than 215,000 miles of track. For example, microwave systems carry information regarding train signals and the remote switching of tracks and routing of trains that are necessary for the safe operation of trains on rights-of-way and through depots and freight yards. These systems also relay critical telemetry data from trackside defect detectors located throughout the rail network. Information about damaged rails, overheated wheel bearings, dragging equipment, rock slides and the like is automatically transmitted from these detectors via mobile radio links to engineers in trains, who can then take the necessary actions to prevent derailments, and via fixed microwave links to dispatchers in distant locations, who are required to know the status of the equipment along the routes for which they are responsible. Microwave systems also are vital to coordination of operations between and among the different railroads. Accordingly, as AAR has affirmed on prior occasions, its goal in this proceeding is to ensure that the implementation of the 2 GHz relocation transition framework will not endanger the safety

and reliability of the nation's railroads. AAR has, therefore, participated actively in every stage of the Commission's proceedings relating to relocation of the 2 GHz band.[1/]

AAR is surprised and deeply distressed by the multitudinous issues raised in the NPRM. What commenced as a focussed and narrowly tailored initiative by the earliest PCS licensees to ensure that they would not bear all relocation costs associated with the forced relocation of 2 GHz microwave licensees to new spectrum has been transformed into a comprehensive review of the rules established by the Commission just two years ago in the Third Report and Order and Memorandum Opinion and Order in ET Docket No. 92-9, 8 FCC Rcd 6589 (released August 13, 1993) ("Third R&O"). A number of the proposals in the NPRM, if adopted, would seriously erode the protections afforded to the nation's railroads and other 2 GHz fixed microwave licensees, all of which were designed to ensure continued safe operations and fundamental fairness.

The Third R&O was a carefully crafted compromise subjected to intense congressional oversight.[2/] There is no empirical evidence that the regulatory regime so

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1/ *See, e.g.*, AAR Petition for Clarification, filed March 23, 1992; Petition to Suspend Proceeding, filed by AAR, the Large Public Power Council and the American Petroleum Institute on April 10, 1992; AAR Comments, ET Docket No. 92-9, filed January 13, 1993; AAR Reply Comments, ET Docket No. 92-9, filed February 12, 1993; AAR Reply Comments, ET Docket No. 92-9, filed November 18, 1993; AAR Comments, ET Docket No. 94-32, filed December 19, 1994; AAR Reply Comments, ET Docket No. 94-32, filed January 3, 1995; AAR Comments in response to Pacific Bell Mobile Services ("Pacific Bell") Petition for Rule Making, filed June 15, 1995; AAR Reply Comments in response to Pacific Bell Petition for Rule Making, filed June 30, 1995.

2/ See, e.g., H. Rep. No. 103-57, 103rd Cong., 1st Sess. 32-32 (1993).

thoughtfully constructed such a short time ago is not working well. In many cases, negotiations between PCS licensees and 2 GHz licensees are just commencing; in other instances, 2 GHz licensees have not even been contacted by PCS operators. Do the largest, most powerful telecommunications companies in the nation who are the A and B block PCS licensees really need full-scale government intervention to tilt the negotiations in their favor? AAR respectfully submits that the answer to that question should be a resounding "no." It is unfair and ultimately unjustified and insupportable for the Commission to be contemplating a wholesale rewrite of these rules now. Accordingly, AAR urges the Commission to deal only with the cost-sharing aspect of the NPRM and to defer or reject all of the remaining proposals in the NPRM.

AAR's Comments focus on the most troublesome elements of the NPRM proposing changes to the definition of comparable facilities and imposing artificial limits on the reimbursement obligations of PCS licensees to 2 GHz fixed microwave licensees. The former threatens the safe and reliable operations of the nation's railroads, the core concern of AAR from the inception of ET Docket No. 92-9. The latter completely undermines the principle of full compensation for relocation costs which was central to the Third R&O.

II. The NPRM's Proposed Clarification of the Term "Comparable Facilities" Threatens to Benefit the PCS Relocators at the Expense of the Microwave Incumbents and Unfairly Penalize the Incumbents

Railroads must be guaranteed extremely reliable communications in order to carry out the important safety applications of railroad radio communications systems. Without the

benefit of clear channels, transmissions relaying safety information will be blocked, interrupted, obscured or delayed. This would result in unsafe conditions and an increased risk of derailments. For example, dispatchers would not be able effectively to control train movements, ensure a safe separation between trains, and coordinate emergency response efforts; defect detectors would not be able to relay information concerning hazardous conditions; and crew members would not be able to request emergency assistance.

The concept of comparable facilities is, therefore, central to the relocation process because it is indispensable to the continued safe and reliable operations of the nation's railroads and of other similarly situated entities like utilities and pipelines. In response to requests for further clarification of the term "comparable facilities," the Commission specified three main factors that would be used to determine whether a facility is comparable (i.e., equal to or superior to the existing microwave facilities): communications throughput, system reliability and operating cost.[3/] A replacement facility will be presumed to be comparable if the new facility's communications throughput and reliability are equal or superior to the existing facility and when the operating costs of the new facility are equal to or less than the existing facility.[4/]

This shorthand formula must not be allowed to sacrifice the attainment of true comparability in favor of administrative convenience. Specifically, AAR is concerned that the three main factors outlined in the NPRM will be construed narrowly so as to threaten the

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3/ Id. at ¶ 73.

4/ Id.

actual comparability of the new system. For example, footnote 126 which states that the system designer will not be required to build the radio link portion of a new microwave system to a higher reliability than that of the other components of the existing system, could not only result in a downgrade of reliability and preclude an incumbent from improving the system at a later date, but also threatens to reduce the reliability of the system to the reliability of the worst link. System design must be comparable to the original system. In addition, the Commission's statement that equivalency is not necessary in each and every element of system performance could encourage PCS relocators to compromise on certain aspects of comparability by attempting to compensate with other factors.

AAR is also concerned that under the NPRM's three factor approach an incumbent would be tied to out-dated technology when, if it entered the market today, it would purchase more spectrum efficient technology. For example, at one time analog equipment was considered state-of-the-art and was the only type of equipment available. Now, however, equivalent state-of-the-art technology is digital and manufacturers are beginning to phase out their production of analog equipment. The Commission's definition of comparability fails to acknowledge the widespread availability of new generations of technology in the marketplace.

The Commission's proposals would further restrict the definition of comparability by obligating the PCS licensee to relocate only the specific microwave links in the incumbent's system that must be changed to prevent harmful interference by the PCS licensee's system.[5/]

5/ Id. at ¶ 76.

This limitation ignores the interrelated nature of the links in a microwave system and the very real possibility that partial relocation could degrade an entire system. The definition of comparability must be sufficiently comprehensive to ensure the quality of an entire network.

In addition, the Commission's proposal to exclude "extraneous expenses" from the reimbursable costs of providing comparable facilities[6/] is completely at odds with the principle of full compensation for relocation costs.[7/] There is no accounting principle which could justify exclusion of fees for attorneys and consultants in the highly technical and highly regulated environment in which these relocation negotiations will take place. Under Generally Accepted Accounting Principles ("GAAP"), these fees would in most cases be treated as direct costs of the relocation process. Even were they treated as overhead costs, they are 100% allocable to the relocation activity. In short, consultants' and attorneys' fees are legitimate expenses that would not be incurred absent the need for relocation.

The incumbent facing displacement must be allowed to contribute effectively and meaningfully to the negotiation process. Its ability to do so will be severely hampered if it cannot recover the reasonable costs of consultants' and attorneys' fees; indeed, it could effectively deprive the incumbent of counsel at the option of the PCS relocator. Once again, such a restriction would tie the hands of the parties involved and would make it impossible to maintain a level playing field in the process of negotiations.

6/ Id.

7/ Third R&O, 8 FCC Rcd at 6589.

III. Relegating Modifications or Entire Systems to Secondary Status Will Compromise the Reliability of Railroad Communications

The Commission also invited comment on two related proposals; limiting grants of primary status to minor modifications that will not add to the cost of the relocation,[8/] and downgrading all microwave incumbents operating in the 1850-1990 MHz band to secondary status on April 4, 2005.[9/] These proposals would seriously undermine the 2 GHz incumbents' safe and effective use of private microwave systems.

Railroads use microwave systems for real-time critical operational functions. Interference to these systems can cause train derailments and other life-threatening disasters. The present day realities of railroad operations -- the high speed of train movement, the density of rail operations in highly populated shipping and rail centers, the value of cargo, the transportation of hazardous materials, as well as the presence of passengers and crew -- make safety a preeminent concern and make the instantaneous relay of safety-related information an absolute imperative. For this reason, operating at secondary status after a set period of time is not acceptable.

Furthermore, establishing a set date after which incumbents would be made secondary will encourage PCS licensees to simply "wait out" the incumbents and will increase the likelihood that incumbents will have to assume the costs of their own relocation. Because PCS development will likely be delayed in rural areas, the ten year limit will also penalize

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8/ NPRM at ¶ 89.

9/ Id. at ¶ 90.

those entities, such as railroads, which have extensive rural networks. These entities would be completely deprived of the protections created to minimize the economic burden imposed on incumbents. The more reasonable approach is not to fix any date at which microwave licensees automatically convert to secondary status, especially if no emerging technology has indicated an interest in the occupied spectrum.

In addition, the scope of permissible modifications that will be entitled to primary status has progressively become narrower and narrower.[10/] Relegating such modifications to secondary status threatens to compromise the reliability of the entire system. Because secondary status poses an unacceptable risk of harmful interference, the practical effect of this progressive narrowing would deprive the railroads of the ability to make necessary system modifications.

IV. The Commission Must Not Impose Artificial Limits on the Cost-Sharing Plan Which Would Hamper Mutually Advantageous Agreements and Burden the Incumbents

AAR fully supports the concept of cost-sharing advocated by the Personal Communications Industry Association ("PCIA") and Pacific Bell, among others. Such a plan would increase the likelihood of a seamless transition, rather than one in which microwave licensees are forced to engage in repeated negotiations with different Personal Communications Service ("PCS") licensees as a system is relocated piecemeal to various

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10/ The Commission acknowledges in n. 153 of the NPRM that the list of minor modifications presented in the NPRM is "more limited than the acceptable modifications listed in Public Notice, Mimeo No. 23115, May 14, 1992."

bands. Moreover a cost-sharing plan serves the public interest by promoting equity and fairness in apportioning the economic burdens of clearing the 2 GHz band for PCS operations.

Any cost-sharing plan adopted by the Commission must not be allowed to undermine the basic negotiation scheme adopted by the FCC, which anticipates an initial voluntary negotiation period of two years during which a microwave incumbent may agree to vacate the band on an expedited basis in exchange for agreed-upon compensation that may exceed the costs of replacement equipment and related expenses.[11/] Specifically, the cost-sharing plan must not impose artificial limits on the nature or scope of the compensation that microwave incumbents may receive during the voluntary negotiation period.

The proposed reimbursement cap of $250,000 per link, plus an additional $150,000 if construction of a tower is required, would impose just such an artificial cap and would have a chilling effect on negotiations. It is essential to ensure that the relocation rules are sufficiently flexible in order to truly minimize the economic burden on incumbents. The yardstick or cap for reimbursement must be the actual costs of the relocation, rather than an arbitrary number picked in advance of most negotiations and without regard to the specific nature of each system to be relocated.

One of the reasons for proposing the reimbursement cap, according to the Commission, was to enable subsequent PCS licensees to know, at the time they bid at auction for their PCS licenses, what their approximate fixed microwave relocation costs will

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11/ NPRM at ¶ 6.

be so that this could be factored into their bids.[12/] But these costs can be readily ascertained by the prospective bidders themselves without the adoption of an artificial reimbursement cap. The prospective PCS bidders will know the geographic location on which they propose to bid and can ascertain, from publicly available records, what 2 GHz microwave facilities are operating in that area. A review of this information, combined with preliminary frequency coordination analysis, will yield sufficient information to enable prospective bidders to arrive at a reasonable estimate of the anticipated actual cost of relocation. Furthermore, if and when the time comes for actual reimbursement from the subsequent PCS operator to the original PCS licensee who paid initially for the relocation from which the subsequent licensee will benefit, the actual costs of the relocation will have been ascertained and documented. This documentation of the actual relocation costs will provide the basis for any potential reimbursement by the subsequent PCS licensee to the initial relocator.

The reimbursement cap is not only unrealistic, but it also reopens the door to the very problems which the cost-sharing plan was designed to resolve. In earlier comments, AAR pointed to one situation which could lead to increased relocation costs i.e., where a suitable relocation frequency is unavailable in a particular geographic area. In this situation, the microwave operations may have to be moved onto fiber optic lines, an exceedingly expensive

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12/ Id. at ¶ 42.

medium in some circumstances (depending upon the length of the link and the topography), which would likely send expenses over the proposed limit.[13/]

Moreover, while it would not be fair to require subsequent PCS licensees to reimburse premium payments, any reimbursement cap on actual costs would fail to adequately address the "free rider" problem that the concept of reimbursement is intended to remedy. The Office of Engineering and Technology study on which the cap is purportedly based, was itself based merely on a series of informal discussions in 1991.[14/] The more time that passes, the less realistic those numbers will be. In addition, because the reimbursement cap is artificially low, it will discourage the relocation of entire microwave systems. Thus, the very reasons which led to consideration of cost-sharing militate against an artificial cap on recovery.

For similar reasons, the proposal to exclude adjacent channel interference from the formula for determining the cost-sharing obligation is flawed and will frustrate the Commission's stated objectives. If one of the goals of the relocation rules is to encourage seamless transitions and cost effective relocations on an industry-wide basis, then there is no valid rationale for distinguishing between co-channel and adjacent channel interference for purposes of determining a cost-sharing obligation. A formula which ensures contribution for adjacent as well as co-channel interference will encourage PCS licensees to engage in

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13/ AAR Comments filed in response to the Pacific Bell Petition for Rule Making (filed June 15, 1995) at 8.

14/ Creating New Technology bands for Emerging Telecommunications Technologies, FCC Office of Engineering and Technology at n. 47 (January 1992).

systemwide replacements, which will in turn minimize the disruption to the microwave incumbents and be the best guarantee of attaining reliable replacement facilities.

The Commission also proposed that an "industry-supported" clearinghouse should administer the cost-sharing plan.[15/] If such a clearinghouse is created for purposes of administrative convenience, it is imperative that the clearinghouse be designed, maintained and operated in such a way as to guarantee the protection of confidential information. Moreover, because the creation and operation of the clearinghouse will necessarily affect all those involved in the process, the initial ground rules regarding what types of information will be gathered, and to whom such data could be made available, must be established in an open process incorporating the comments and balancing the needs of all interested parties. For example, microwave incumbents should be given the right to inspect and verify information pertaining to their own systems. This type of verification will promote full participation and good faith negotiations.

V. Good Faith Obligations Must be Reciprocal and Must Not Preclude Discussions Concerning What Constitutes Comparable Facilities

The Commission also proposed to clarify the meaning of the obligation to negotiate in good faith during the mandatory negotiation period. Specifically, the Commission concluded that, "an offer by a PCS licensee to replace a microwave incumbent's system with comparable facilities...constitutes a good faith offer...failure to accept an offer of comparable

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15/ NPRM at ¶ 62.

facilities would create a rebuttable presumption that the incumbent is not acting in good faith."[16/]

The notion of attempting to define in regulations what constitutes good faith negotiations reflects an improper level of government micromanagement of negotiations between sophisticated parties with substantial resources and has absolutely no rightful place in the FCC's rules. The Commission appears to be suggesting that a counteroffer by the incumbent is an act of bad faith. This proposal, if adopted, would convert arms-length negotiations into a contract of adhesion whereby some of the largest and most powerful companies in the world could dictate the terms of the accord.

If a microwave incumbent replies to an initial offer with a counterproposal requiring improvements in the initial offer, such an act should not constitute bad faith. Just because the parties may differ as to what substantively constitutes comparable facilities does not mean that one or both of the parties are negotiating in bad faith. The standard should allow both parties the necessary flexibility to negotiate mutually agreeable terms. Moreover, any reasonable concept of good faith obligation must apply on a reciprocal basis, e.g., if a microwave incumbent makes an initial offer, the PCS entity must respond and be bound by the same good faith standard.

16/ Id. at ¶ 69.

VI. Parties Should Not be Required to Submit Independent Cost Estimates During the Voluntary Negotiation Period

The Commission also invited comment on whether the PCS relocator and the microwave incumbent should be required to submit independent cost estimates during the voluntary negotiation period.[17/] Such a requirement would be inappropriate in the context of voluntary negotiations. As the Commission itself pointed out, during the voluntary negotiation period "negotiations are strictly voluntary and are not defined by any parameters. Thus, an emerging technology licensee may choose to offer premium payments or superior facilities as an incentive to the incumbent to relocate quickly."[18/] Because the parties are free to negotiate or to refuse to negotiate during the voluntary negotiation period, it would be improper, indeed incongruous, to require independent cost estimates during this same period.

Conclusion

AAR supports the adoption of a cost-sharing plan which will facilitate negotiations and promote sound principles of equity. AAR is deeply concerned, however, by the Commission's attempts to micromanage the negotiation process. Imposing an arbitrary cap on reimbursable costs should be rejected in favor of measuring reimbursable expenses by the actual costs of the relocation. Moreover, the Commission's new "clarification" of the term

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17/ Id. at ¶ 78.

18/ Id. at ¶ 6.

comparable facilities, as well as its proposal to downgrade incumbent operations to secondary status after ten years, will pose a direct threat to safe and reliable railroad operations.

For the foregoing reasons, AAR respectfully submits these Comments and urges the Commission to act in a manner fully consistent with the views expressed herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Bridget Y. Monroe, a secretary with the law firm of Verner, Liipfert, Bernhard, McPherson and Hand, hereby certify that on this 30th day of November, 1995, a copy of Comments of the Association of American Railroads was mailed, first class postage prepaid to the following:

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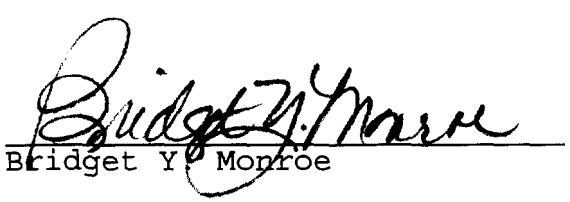

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